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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1974

PHILIP GOLDBERG, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# BRIEF FOR CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND FEDERAL DEFENDERS OF SAN DIEGO, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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## STATEMENT OF INTEREST OF AMICI CURIAE

California Attorneys for Criminal Justice (CACJ) is a California Organization of California private attorneys, public defenders, and interested law students whose objective is the furtherance of criminal justice.

Federal Defenders of San Diego, Inc., is a private non-profit corporation established to secure competent representation for indigent defendants.

Both organizations are dedicated to the improvement of the administration of justice, the preservation of the rights of individuals, and fairness in criminal prosecutions where life and liberty are at stake.

Amici are extremely concerned over the outcome of the case at bar because of their common desire to have fundamental constitutional rights of criminal defendants protected. Amici are dedicated to giving meaning to the Sixth Amendment right to the effective assistance of counsel. A system of justice founded on the adversary system requires full presentation of the issues in a criminal case by competent counsel on both sides. Amici believe the decision of the Ninth Circuit Court of Appeals was contrary to the goal of full disclosure. If that judgment is upheld it would have disastrous and destructive impact on the Fifth and Sixth Amendment rights of the criminally accused.

Amici fully agree with the position of the

petitioner that the order of the trial court at issue here was improper and that the decision of the Court of Appeals was erroneous. This brief is submitted in support of petitioner's arguments.



## SUMMARY OF ARGUMENT

The prosecutors' notes of forty hours of conversation with the key government witness constitute statements of that witness that are compellable under the Jencks Act. The notes were read to the witness and he corrected and confirmed their accuracy. Failure of the trial court to either order their production or to properly preserve them for the record constituted reversible error.

Petitioner's Sixth Amendment rights to compulsory process and effective confrontation were abridged when these notes were not made available to him for purposes of cross-examination. The key government witness was originally a co-defendant in petitioner's case. He entered into a contractual agreement with the prosecutors concerning making a pretrial statement and testifying in accordance with that statement in petitioner's trial. In accordance with this contract, he met with the prosecutors over a period of five days. Notes of those meetings were adopted and approved by the witness. The trial court's refusal to order production of those notes denied petitioner his right to effective cross-examination of the key witness against him. This was constitutional error of the first magnitude and cannot be cured by an attempt to show lack of prejudice.

The trial court's ruling that the notes were protected by the work-product doctrine was erroneous. Historically, the work-product doctrine has been

viewed primarily as a limitation on the ability of a party to obtain pretrial discovery. Materials that are basically evidentiary and impeachment matter are testimonial in nature. A trial court's inherent discretion to rule on evidentiary matters cannot be limited by the work-product doctrine. Also, the prosecutors should have interviewed their key witness in the presence of their case agent as defense counsel are required to do in order to avoid the potential risk of having to testify at trial.

Finally, the trial court erred in the procedure it followed after petitioner made a Brady claim. The court never received assurance from the prosecutor that the notes contained no Brady material and also refused to inspect the notes or preserve them for appellate purposes. Petitioner's case presents a proper vehicle for this Court to establish a uniform procedure for trial courts to follow in resolving Brady issues. Amici respectfully request this Court to adopt the procedure presented herein.



I

## THE TRIAL COURT ERRED IN REFUSING TO ORDER PRODUCTION OF THE PROSECUTORS' NOTES UNDER THE JENCKS ACT, AND IN REFUSING TO CONDUCT AN IN CAMERA INSPECTION OF THOSE NOTES.

### A. The Prosecutors' Notes of Conversations With the Key Government Witness Constitute Statements Adopted by That Witness Under 18 U.S.C. §3500(e) and are Compellable Under the Jencks Act.

The government's key witness, Edwin S. Newman, was originally a co-defendant with petitioner. Newman's case was severed in order that he could testify for the government against petitioner. Newman entered into a plea agreement with the government that required him to give a complete statement under oath concerning the events which were the subject for prosecution. The agreement also required Newman to testify as a witness for the United States in conformity with the statement that had been given to the United States Attorney under oath before trial. On 11 May Newman participated in a two and one-half hour question and answer session with two attorneys for the government. A reporter was present at that conference and defense counsel was given a transcript of Newman's statements. That transcript revealed that the question and answer session would continue and that there were more items to be explored at a further time. Subsequently, Newman testified

at petitioner's trial. He was the 35th and last witness called by the government. He was the key government witness against the petitioner. At petitioner's trial, defense counsel on cross-examination brought out the fact that Newman had met with the prosecutors for interviews in connection with this trial testimony on at least five different days prior to his testimony on direct examination; that no reporter was present at these meetings and that only Newman and the two prosecutors were present; that during the interviews the prosecutors took notes which they read back to Newman from time to time and Newman would correct them. (R. T. K177-180) Petitioner then moved for production of these notes under 18 U.S.C. §3500, the Jencks Act. The court, without hearing from the government nor inspecting the notes, stated:

> "Aren't these attorney's work products, notes of interviews with witnesses just like yours are? Denied." (R. T. K-181)

On the following day petitioner renewed his demand for the notes under the Jencks Act. Petitioner's demand was again denied and he was instructed to prepare a memorandum. The following Monday petitioner filed with the court a memorandum renewing his demand for production of the prosecutors' notes under both the Jencks Act and Brady v. Maryland, (C. T. 361-364).



Petitioner also requested an in camera inspection of these notes and, after same, a reconsideration by the court of its ruling denying production of the notes. The court again refused petitioner's demand citing the work-product privilege. Consequently, petitioner was denied the opportunity to review these notes. Furthermore, the court never inspected the notes in camera and they were never properly[1] made part of the record in this case.

In Jencks v. United States, 353 U.S. 657 (1957) this Court held that a defendant in a criminal case was entitled to production of government reports that contained statements of government witnesses who testify against him. The only foundation that a defendant need show is that the reports existed and that they concerned the events and activities related in the witnesses' testimony. The defendant was not required to show that an inconsistency existed since he could not do so without inspecting the reports.

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1 / Apparently, at oral argument before the Ninth Circuit Court of Appeals, one of the prosecutors requested and was granted permission to lodge a packet of documents with the court. He described the packet as the notes he could now find. The notes were never produced as part of an adversary hearing. It is well established that this Court will not consider affidavits, assertions, or documents dehors the record. McClellan v. Carland, 217 U.S. 268, 282-283 (1901); Lawn v. United States, 355 U.S. 339, 354 (1957).

As a result of expansive interpretations of the Jencks decision by lower courts, Congress enacted 18 U.S.C §3500, commonly referred to as the Jencks Act. [2] It states in pertinent part:

> (b) After a witness called by the United States has testified on direction examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. . .
>
> (e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means. . .
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him:

The first case decided by this Court construing

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2 / The complete text of 18 U.S.C. §3500, commonly referred to as the Jencks Act, is reproduced in Appendix A to this brief.



the Jencks statute was Palermo v. United States, 360 U.S. 343 (1959), in which a defendant was denied production of a 600-word memorandum summarizing parts of a 3 1/2-hour interrogation of the witness by a government agent. This Court held that such a memorandum was not a statement of the kind required to be produced under 18 U.S.C. §3500(e). Justice Frankfurter announced the basic standard for production by noting the importance of whether "the statement could fairly be deemed to reflect fully and without distortion what had been said to the government agent." Palermo v. United States, supra at 352. By way of explanation, he went on to state:

> "We find the legislative history persuasive that the statute was meant to encompass more than mere automatic reproductions of oral statements." Id. at 352, and,
>
> "In expounding this standard we do not wish to create the impression of a 'delusive exactness.' The possible permutations of fact and circumstance are myriad." Id. at 353.

In petitioner's case, the prosecutors' notes were taken over a five-day period and unlike Palermo, the notes were read back to the witness and he would correct them. Such a procedure guarantees that the notes "can fairly be deemed to reflect fully and without distortion what had been said to the prosecutors."

In Campbell v. United States II, 373 U.S. 487

(1963) [3], a government agent took longhand notes which were complete with respect to the pertinent information given by the witness, although not a complete, word-for-word transcription of what the witness had said. Later, the agent prepared a memorandum from the notes and subsequently destroyed the notes. This Court held the memorandum producible under 18 U.S.C. §3500(e)(1), and stated:

> "Plainly, if [the agent] in making the oral representation was in fact reading the notes back to [the witness], the latter's adoption of the oral presentation would constitute adoption of a written statement made by him, namely, the notes. See United States v. Annunziato, 293 F.2d 373, 382 (C.A. 2d Cir. 1961); United States v. Aviles, 197 F.Supp. 536, 556 (S.D.N.Y. 1961)." Id. at 492.

The witness in this case, Newman, had the prosecutors' notes read back to him,and he made

3 / This case was heard by the Supreme Court on two occasions. The first time it was remanded for further factual determinations concerning the "statement." Campbell v. United States, 365 U.S. 85 (1961). That first case will hereinafter be be referred to as Campbell I.



changes. On appeal, the government admitted these notes "were often prepared only after lengthy conversations had occurred and a mutual understanding of the factual situation had been reached." (Brief of the Appellee before the Ninth Circuit Court of Appeals, p. 64) Consequently, the prosecutors' notes constitute a written statement made by Newman and adopted and approved by him. Since they were adopted by the witness, the notes need not be a verbatim recital of Newman's oral statements over the five-day period. [4] Clancy v. United States, 365 U.S. 312, 314-315 (1961).

A number of cases have held that notes of the witnesses' statements taken by prosecutors are compellable under the Jencks Act. United States v. Hilbrich, 341 F.2d 555 (7th Cir. 1965), cert. den., 381 U.S. 941 (1965), reh. den. 382 U.S. 874 (1965), reh. den., 384 U.S. 1028 (1966); United States v. Aviles, 314 F.2d 186 (2d Cir. 1963); Saunders v. United States,

4 / It should be noted that in Palermo the government agent prepared the memorandum and the defendant requested its production when the witness, not the agent,testified. Hence, the proper standard would be 18 U.S.C. §3500(e)(2) which requires the transcription to be a substantially verbatim recital of the oral statement and also to be taken contemporaneously with the oral statement. Had the demand been made for this memorandum after the agent himself testified it would clearly have been producible under 18 U.S.C. §3500(e)(1) as a written statement made by the witness (the agent) and signed by him.

315 F. 2d 346 (D. C. Cir. 1973); United States v. Smaldone, 484 F. 2d 311 (10th Cir. 1973), cert. den., 415 U.S. 915 (1974).

Where, as here, the key government witness, formerly a business attorney for the defendant, had actually signed a contract with the government regarding his testimony, and had met with prosecutors to discuss his testimony for over forty hours, during which time the prosecutors took notes that were read back to and corrected or confirmed by the witness, those notes qualify as compellable statements under the Jencks Act when a proper and timely demand was made by petitioner.

Failure of the trial court to compel production of the prosecutors' notes was prejudicial error which should result in a reversal of petitioner's conviction. Clancy v. United States, supra at 316.

B. The Trial Court Erred in Refusing to Conduct an In Camera Inspection of the Prosecutors' Notes.

There are two distinct areas where a trial court has certain duties regarding demands for production of statements in the possession of the government under the Jencks Act. It is settled that the original burden rests on the defendant to make a proper demand for production. 18 U.S.C. § 3500(b). "The burden rests on the defendant to invoke the statute at the appropriate time." Ogden v. United States, 303 F. 2d 724, 733



(9th Cir. 1962). The petitioner obviously made a proper and timely demand in this case. Once a proper demand is made, the government may claim that the statement in its possession does not "relate to" the subject matter of the witnesses' testimony. The trial court is then under a duty by the terms of the Act itself to conduct an in camera inspection. 18 U.S.C. §3500(c). Should the government claim the documents in its possession do not qualify as "statements" under the Act, the trial court's duty is not explained by the terms of the Act itself. However, this Court in its first decision interpreting the Jencks Act, approved the in camera inspection method of determining whether particular documents qualify as "statements" under the Act:

> "[W]hen it is doubtful whether the production of a particular statement is compelled by the statute,we approve the practice of having the government submit the statement to the trial judge for an in camera determination. Indeed, any other procedure would be destructive of the statutory purpose. . ."
>
> " It is also the function of the trial judge to decide, in light of the circumstances of each case what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement. . ."

Palermo v. United States, 360 U.S. 343, 354-355 (1959).

Subsequent to the Palermo case, the procedure of conducting in camera inspections and taking extrinsic evidence has been viewed as an affirmative duty of the trial court. Campbell v. United States I, 365 U.S. 85, 92-96 (1961); Clancy v. United States, 365 U.S. 312, 314-316 (1961); United States v. Chitwood, 457 F.2d 676, 678 (6th Cir. 1972), cert. den. 409 U.S. 852 (1972); Saunders v. United States, 316 F.2d 346, 349 (D.C. Cir. 1963); Ogden v. United States, 303 F.2d 724, 733 (9th Cir. 1962).

Petitioner demanded production of the subject notes on at least three occasions. He also requested the trial court to conduct an in camera inspection. The trial court refused all requests. The government never claimed the notes did not "relate to" Newman's direct testimony, nor did they claim the notes failed to qualify as "statements." The trial court, on its own, ruled the notes must be work product without ever inspecting them. After petitioner's third request, the government broke its silence and alleged the notes were work product. Consequently, the subject notes were never properly made part of the record. Since the trial court failed to perform what many courts have called its "affirmative duty," the harmless error rule of Rosenberg v. United States, 360 U.S. 367 (1959), is inapplicable to petitioner's case.

In Rosenberg, supra, refusal to produce a statement was held harmless error since the information in that statement concerned a small part of the witness'



testimony and it was revealed to defense counsel during questioning by him and by the trial judge. Rosenberg v. United States, supra at 370. In petitioner's case, Newman's testimony, and his five days of conferences with the prosecutors which gave rise to the notes, far exceeded in scope and detail the prior recorded statement that had been turned over to defense counsel. Under these circumstances the trial court's error cannot be considered harmless.

The critical issue in petitioner's trial was the credibility of the key government witness Newman vis-a-vis that of petitioner himself. In a similar situation in Williams v. United States, 338 F.2d 286 (D.C. Cir. 1964), the court refused to invoke the harmless error rule of Rosenberg and stated:

> "The issue is whether counsel should have had the choice of using the statements to test the witnesses' credibility." Id. at 290.

It is extremely difficult for a court of review after reading a cold and emotionless transcript to speculate whether certain statements could have been used effectively during the course of battle in the trial court. That is the type of decision that basically lies with the defendant. This Court recognized that in Clancy v. United States, 365 U.S. 312, 316 (1961), where refusal to compel Jencks Act material was held to be prejudicial error requiring reversal, by stating ". . . it is not for us to speculate whether they could

have been used effectively."

In United States v. Missler, 414 F.2d 1293 (4th Cir. 1969) cert. den. 397 U.S. 913 (1970), the court framed the issue as follows:

> "The requirements of the Jencks Act are intended to provide defendants in federal prosecutions with an opportunity for thorough cross-examination of government witnesses, making the constitutionally guaranteed right of confrontation more meaningful. Violations of the statute are necessarily attended by the danger that this precious right will be impaired. For this reason, and also because it is ordinarily difficult upon review of a cold record to ascertain the value to the defense of a statement withheld, violation of the Act is excused only in extraordinary circumstances. [citations omitted] Unless it is perfectly clear that the defense was not prejudiced by the omission, reversal is indicated." Id. at 1303, 1304.

Due to the unique circumstances in the present case surrounding the key government witness -- his status as a co-defendant and prior business associate, his unique deal with the government, the extent of his testimony at trial, the narrow extent of pretrial discovery of his statements, and the particular importance of his credibility -- petitioner's remedy is a reversal of his conviction and the granting of a new trial.



II

## PETITIONER'S RIGHTS UNDER THE SIXTH AMENDMENT WERE ABRIDGED BY THE TRIAL COURT'S FAILURE TO COMPEL PRODUCTION OF THE PROSECUTOR'S NOTES

Of primary importance in this case is the issue of whether refusal to produce the notes so effected petitioner's Sixth Amendment rights to confrontation and compulsory process that he was denied his due process right to a fair trial under the Fifth Amendment. These issues are closely interrelated but must be decided in resolving petitioner's case. Should this Court hold the notes are Jencks Act statements, these issues will be resolved in the context of prejudicial versus harmless error. (See argument IB) If the notes are held not to be statements as the Court of Appeals held, the question remains whether the Fifth and Sixth Amendments compel production outside the realm of the Jencks Act.

This Court has recognized that just below the surface of Jencks Act questions lurk serious Fifth and Sixth Amendment issues, Palermo v. United States, 360 U.S. 343, 362 (1959) (J. Brennan, concurring); United States v. Augenblick, 393 U.S. 348, 356 (1969); as have circuit courts, United States v. Missler, 414 F.2d 1293, 1303, 1304 (4th Cir. 1969), cert. den. 397 U.S. 913 (1970); United States v. Cleveland, 477 F.2d 310 (7th Cir. 1973); United States v. Aaron, 457 F.2d 865 (2d Cir. 1972).

"There is an obvious constitutional problem in an interpretation that the [Jencks] statute restrains the trial judge from ordering such a statement produced. Less substantial restrictions than this of the common-law rights of confrontation of one's accusers have been struck down by this Court under the Sixth Amendment, see Kirby v. United States, 174 U.S. 47. And in such circumstances, there becomes pertinent the command of that amendment that criminal defendants have compulsory process to obtain witnesses for their defense. See United States v. Schneiderman, 106 F.Supp. 731, 738." Palermo v. United States, supra at 362. (J. Brennan concurring).

Although the majority opinion in Palermo v. United States, supra at 351, viewed the Jencks Act as the exclusive device for production of government documents, this Court apparently adopted Justice Brennan's view when it held evidence favorable to the accused must be revealed to him on due process grounds. Brady v. Maryland, 373 U.S. 83, 87 (1963). (See argument IV, infra). Also, when the issue of compelling production of secret grand jury testimony of government witnesses was raised in Dennis v. United States, 384 U.S. 855 (1965), it was held that defendants



had a right to that testimony for purposes of cross-examination even though they were not expressly compellable under the Jencks Act.

> "These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." Dennis v. United States, supra at 870.

The Jencks Act was amended subsequent to Dennis to expressly include grand jury testimony of government witnesses. 18 U.S.C.§3500(e)(3).

It seems apparent then, that based on Fifth and Sixth Amendment considerations "it is not inconsistent with achievement of the statute's [18 U.S.C. §3500] aim to require the production of statements outside the scope of the statute where the fair administration of justice so demands." Palermo v. United States, supra at 363 (J. Brennan concurring).

Petitioner was denied the opportunity to inspect the subject notes prior to cross-examination of the government's key witness. The trial court's discretionary power to compel production of those notes should have been exercised in light of the compulsory process clause of the Sixth Amendment. See United States v. Schneiderman, 106 F.Supp. 731, 735 (S.D.Cal. 1952); cited with approval in Jencks v. United States, 353 U.S. 657, 688 n.13 (1957).

In accord, United States v. Augenblick, 393 U.S. 348 (1969); Washington v. Texas, 388 U.S. 14, 17-19 (1967). By refusing to inspect the notes in camera and failing to order production of the notes to perfect the record, the trial court abridged petitioner's Sixth Amendment right to compulsory process.

Furthermore, since Newman was the key government witness and his testimony in many respects was in direct contrast to petitioner's testimony, a denial of effective cross-examination "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Brookhart v. Janis, 384 U.S. 1, 3 (1966), cited with approval in United States v. Illinois, 390 U.S. 129, 131 (1968), and Davis v. Alaska, 415 U.S. 308, 318 (1974).

This Court has historically placed great emphasis on the right of those accused of crime to confront the witnesses against them. Kirby v. United States, 147 U.S. 47, 55-56 (1899); Alford v. United States, 282 U.S. 687, 692 (1931); In re Oliver, 333 U.S. 257, 273 (1948); Pointer v. Texas, 381 U.S. 400, 405 (1965); Smith v. Illinois 390 U.S. 129, 131-132 (1968); Barber v. Page, 391 U.S. 719, 725 (1968); Davis v. Alaska, 415 U.S. 308, 315, 316 (1974).

> "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no



> one, certainly no one experienced in the trial of law suits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case."
> Pointer v. Texas, supra at 404. See also Douglas v. Alabama, 380 U.S. 415, 418 (1965).

The conduct of the trial court has rendered it useless to speculate as to the contents of the subject notes, how petitioner could have used the notes on cross-examination of Newman, or how the jury would have been effected by disclosure of the notes. In Alford v. United States, supra, and Smith v. Illinois, supra, however, criminal convictions were reversed because defense counsel was prevented from merely inquiring into the true name and address of the key witnesses, and this Court stated these questions could open potential avenues of bias and were the starting point in exposing falsehood and bringing out the truth. It is also rather coincidental to note that in Alford the defendant had been convicted of using the mails to defraud, the key government witness was a former employee of the defendant, and that witness testified to uncorroborated conversations of the defendant of a damaging nature. Thus the facts of petitioner's case are remarkably similar to Alford. In his frequently quoted opinion Justice Stone stated:

"It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . .To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . ." Alford v. United States, supra, 282 U.S. at 692.

Alford was quoted extensively in the very recent case of Davis v. Alaska, 415 U.S. 308 (1974), where a defendant was precluded from questioning a key government witness concerning his status as a juvenile probationer because of a state's policy of protecting juvenile records. Defense counsel wishes to develop a theory of possible bias so inferences could be made of undue pressure because of the witness' status as a probationer. This Court held that the defendant



was "denied the right of effective cross-examination" Id. at 318, and the "State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." Id. at 320.

In the present case the witness Newman was vulnerable to undue pressure because of the outstanding indictment, and petitioner was precluded from pursuing the extent of Newman's cooperation with the government due to lack of access to the notes. This right has been called "[o]ne of the fundamental guarantees of life and liberty," Kirby v. United States, supra at 55; "one of the safeguards essential to a fair trial," Alford v. United States, supra at 692; and "as indispensable an ingredient as the right to be tried in a courtroom presided over by a judge." Pointer v. Texas, supra at 410.

> "There are few subjects, perhaps, upon which this court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, supra at 405.

When notes exist of five days of lengthy conversations with the key government witness and petitioner has

had only partial pretrial discovery of that witness' statements, petitioner's right to effective cross-examination has been denied by the trial court's refusal to compel production of those notes. As in Alford v. United States, supra; Smith v. Illinois, supra; and Davis v. Alaska, supra, this Court should refuse to speculate as to the effect production would have had at trial and simply reverse petitioner's conviction.



III

THE TRIAL COURT'S REFUSAL TO COMPEL PRODUCTION OF EVIDENTIARY AND IMPEACHMENT MATERIAL BASED ON THE WORK PRODUCT DOCTRINE CONSTITUTED A DENIAL OF PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL

A. The Work Product Doctrine does not Limit a Judge's Broad Discretion to Compel Production of Evidentiary and Impeachment Matter at Trial.

The trial court denied petitioner's demand for production of the prosecutors' notes in this case stating that those notes were protected under the work product doctrine. This ruling was made without the benefit of even reviewing the prosecutors' notes in camera. It is clear from reading 18 U.S.C. § 3500, the Jencks Act, that there is no explicit work-product exception in the Act itself. Petitioner knows of no decision of law establishing a work-product exception to the Jencks Act. On the contrary, a number of cases have held that a work-product exception does not exist as to the Jencks Act. In Saunders v. United States, 316 F. 2d 346, 350 (D.C. Cir. 1963), the court held that if notes fell within the provisions of the Jenoks Act there would be no invasion of the attorney's work product no matter when the interview was conducted. Id., at 350. In United States v. Hilbrich, 232 F. Supp. 111 (N. D. Ill. 1964), the court stated that an appellate court would not uphold a work product claim interposed in an attempt to deny a

criminal defendant that which he would otherwise be entitled. The trial court did, however, rule that certain notes of government counsel were work product and need not be delivered. On appeal, the Seventh Circuit held that:

> "The district court erred at the trial by stating in response to defendant's broad motion to produce that 'handwriting or notes' of government counsel were part of their 'work product' and need not be delivered. There is no 'work product' exception to the Jencks Act." United States v. Hilbrich, 341 F. 2d 555, 557 (7th Cir. 1965), cert. den., 381 U.S. 941 (1965); reh. den. 382 U.S. 874 (1965); reh. den. 384 U.S. 1028 (1966).

Both Saunders and Hilbrich concerned notes that were taken by government attorneys during the course of interviews with witnesses who subsequently testified for the government.

The question remains whether the prosecutors' notes in this case are protected from production under the general provisions of the work-product doctrine as enunciated by this Court in Hickman v. Taylor, 329 U.S. 495 (1947). The basic purpose of the work-product doctrine is to protect the mental processes of an attorney, thereby giving him a zone of safety in which he can analyze, prepare, and plan



stratgey concerning his client's case. When first establishing the work-product doctrine, this Court stated:

> "Historically, a lawyer is an officer of the Court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible

and intangible ways - aptly and roughly termed by the circuit court of appeals in this case [153 F. 2d 212, 223] as the 'Work product of the lawyer'. Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." Hickman v. Taylor, 329 U.S. 495, 510-511 (1947).

The work product doctrine is not absolute. In United States v. Nobles, __ U. S. __, 95 S.Ct. 2160 (1975), defense counsel sought to impeach the credibility of key prosecution witnesses by testimony of a defense investigator regarding statements previously obtained from the witnesses by the investigator. This Court held that a trial court may compel the defense, as a condition precedent to the investigator's testifying, to reveal the relevant portions of the investigator's report for the prosecution's use in cross-examining him. In that case, the investigator's



report fell within the broad definition of the work-product doctrine as enunciated in Hickman v. Taylor, supra. The majority opinion in Nobles stated that the work-product privilege was waived with respect to matters covered by the defense investigator's testimony. United States v. Nobles, __ U. S. __, 95 S.Ct. 2160, 2170-2171 (1975). This Court intimated, however, that the scope of the work product doctrine at trial may be limited, but refused in the Nobles case to undertake to deliniate the scope of the work-product doctrine at a trial.

Historically the work-product doctrine has been viewed primarily as a limitation on the ability of a party to obtain pretrial discovery. In Hickman v. Tyalor, supra, the respondent admitted that he was requesting the subject materials simply to help him to prepare his case. This Court properly recognized that certain materials that could be considered work product as well as evidentiary or impeachment materials are subject to pretrial discovery because of their testimonial nature. Hickman v. Taylor, supra at 511. Therefore, the work-product doctrine cannot prevent production of materials at trial that are of a testimonial or impeachment nature. A trial court's broad discretion over evidentiary matters cannot be limited by the work-product doctrine.

In United States v. Nobles, supra, it was stated that:

"The Sixth Amendment does not confer

the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half truth." United States v. Nobles, supra at 2171.

Surely then, the work product doctrine , or for that matter the Jencks Act itself, cannot confer the right to present testimony free from the legitimate demands of the adversarial system. One cannot and should not be permitted to invoke the work-product doctrine or the Jencks Act as a justification for presenting what might have been a half truth. Compelling production of the prosecutors' notes in this case would have simply aided the fact finding process. If the notes were consistent with the witness' testimony they would have been entirely harmless. If the notes were in fact inconsistent with the witness' testimony they would have been of unquestioned value to the jury and would have enhanced the search for truth. Petitioner in this case was merely demanding to view notes of statements made by the key government witness. This was not an attempt to rummage through the files of the prosecutor nor to gain information concerning his opponent's strategy or mental impressions of the case. Petitioner was seeking to discover if prior inconsistent statements had been made, and if so, to use those statements to impeach a key witness. Under these circumstances, the



petitioner's Sixth Amendment right to confrontation of the main witness against him was abridged by the failure of the trial court to even view these notes in camera to establish whether they were compellable under any of the available theories of law raised by petitioner. As this Court observed in United States v. Nixon, 418 U.S. 683 (1974):

> "We have elected to employ an adversarial system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be found on a partial and speculative presentation of facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To insure that justice is done, it is imperative to the function of courts that compulsory processes be available for the production of evidence needed either by the prosecution or by the defense." Id. at 709.

In Nixon this Court ordered pretrial disclosure

of presidential tapes, thus overriding a claim of executive privilege. While recognizing that the privilege was "constitutionally based" (Id. at 711), this Court nevertheless ordered disclosure because:

> ". . . the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." Id. at 712.

The importance of the production of evidence had been previously stated by this Court in Jencks v. United States, 353 U.S. 657 (1957). The purpose of disclosure is to enhance the truth finding process. Hence, the work-product doctrine can impose no restrictions on the trial judge ordering production of evidentiary and impeachment matters at trial. See United States v. Nobles, __ U.S. __, 95 S.Ct. 2160, at 2176 (J. White concurring).

B. The Jury's Interest in Obtaining all Relevant Information Outweighs the Public Policy Against Putting in Issue the Credibility of the Prosecutor, Where that Issue Could Have Easily Been Avoided by the Prosecutor Himself.

Justice White in his concurring opinion in United States v. Nobles, __ U.S. __ (1975), 95 S.Ct. 2160, 2176 (1975), stated that the work-product doctrine would not be applicable at trial with respect to matters



that were evidentiary or impeachment materials. Justice White, however, would make an exception to that rule with respect to the production and use of oral statements written down by the lawyer since that would create a substantial risk that the lawyer would have to testify. It is true that courts have frowned on any practice under which an attorney who tries a case also testifies as a witness. Yet, in the present case it was the conduct of the prosecutors themselves that created the potential risk of their having to testify. The key government witness in this case was interviewed by the government prosecutors alone. There was no case agent or investigator present during those interviews. The potential risk of the prosecutors in this case having to eventually take the stand and testify could have easily been avoided by conducting the interview of the key witness in the presence of a third person. To require government attorneys to do this would be to place upon them no greater burden than has been placed on defense attorneys for quite some time.

> "Unless the lawyer for the accused is prepared to forego impeachment of a witness by the lawyers own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present his impeaching testimony, the lawyer should avoid interviewing a prospective witness except in the

presence of a third person." A.B.A. Project On Standards for Criminal Justice, Standards Relating to the Defense Function, § 4.3(d), p. 161 (Approved Draft 1971).

In the present case the jury's interest in obtaining all relevant information far outweighs the policy against putting in issue the credibility of the prosecuting attorneys where those attorneys themselves could have easily avoided the situation by interviewing the key witness in the presence of a third person such as their case agent. To require government attorneys to interview witnesses in the presence of third persons would merely be imposing a reciprocal burden upon them. In the present case the prosecuting attorneys knew that Mr. Newman would be a key government witness in a jury trial that was expected to begin within a couple of days. In fact the purpose of the interview with Mr. Newman was to get a full and complete statement from him in preparation for that trial. The first portion of his statement had been taken in the presence of third parties and had been recorded. At that time it was understood by all that more interviews would follow. These interviews were not preliminary investigation in order to establish a case or to decide whether or not to take a case to the grand jury. There was no doubt that Mr. Newman would be testifying momentarily. Under these circumstances it is reasonable to require prosecuting attorneys to interview witnesses in the



presence of a third person. Not to do so would encourage prosecutors to assume the role of their investigators. It would also create the substantial danger that inconsistent statements by accomplices and cooperators would never be disclosed, thereby seriously hampering the search for truth in criminal prosecutions.

IV

THE TRIAL COURT ERRED IN REFUSING TO COMPEL PRODUCTION OF THE PROSECUTORS' NOTES UNDER THE DOCTRINE OF BRADY V. MARYLAND

The statements of Newman to the prosecutors should be held compellable under Brady v. Maryland, 373 U.S. 83 (1963), and the refusal of the trial court to order their production for the record, an abuse of discretion. In Brady this Court held that reversal should follow failure to disclose certain materials, not on a theory of punishing society for the misdeeds of a prosecutor, but rather to insure the defendant's due process rights. The much-quoted heart of the opinion states:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor. Brady v. Maryland, supra at 87. See also Giles v. Maryland, 386 U.S. 66 (1967), and Giglio v. United States, 405 U.S. 150 (1972).

To insure a fair trial, a decision or verdict should be based on all the available evidence, much of which, "because of imbalance in investigative resources, will be exclusively in the hands of the government." United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971). In Dennis v. United States, 384 U.S. 855, 873



(1965), this Court stated that "in our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." In reversing for the trial court's failure to compel disclosure of the grand jury testimony of key government witnesses, notice was taken of the "growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." Id. at 870.

Petitioner made a specific request for materials that were exclusively in the hands of the government. It cannot be argued that Newman, with an outstanding indictment against him, would have cooperated with petitioner or his counsel. Consequently, by suppressing the notes the prosecution guaranteed itself exclusive access to this storehouse of relevant fact.

In Moore v. Illinois, 408 U.S. 786 (1972), the following criteria were established by this Court to determine just what material ought to be disclosed under Brady:

> ". . .(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." Id. at 794-795.

Petitioner made at least three timely requests for production of the notes and they were suppressed by the prosecution and the trial court.

Various standards have been enunciated as to the

degree to which evidence must be favorable to the accused for its nondisclosure to warrant reversal. See, e.g., United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971) (might have led the jury to entertain a reasonable doubt); United States v. Brawer, 367 F. Supp. 156 (S. D. N. Y. 1973)(a substantial probability that the result would have been altered); United States v. Keogh, 391 F.2d 138 (2d Cir. 1968) ( if the evidence was in fact favorable).

Similarly, with respect to materiality courts have differed on whether failure to disclose impeachment material should warrant reversal. See, e.g., Dennis v. United States, supra; Napue v. Illinois, 360 U.S. 264 (1959); and cases cited in argument II, supra. Cf. Klein v. Smith, 383 F.Supp. 485 (D.C.N.Y. 1974); Ingram v. Peyton, 367 F.2d 933 (4th Cir. 1966).

The conduct of the trial court has effectively precluded petitioner from arguing the favorability and materiality of the contents of the disputed notes. He has never seen them and cannot argue in a vacuum.5 /

5 / It should be noted that commentators have argued that favorability, as the term has come to be used, is a misleading standard for Brady disclosure. In making the standard whether disclosure would have changed the outcome of the trial, courts have diverged from the spirit of Brady. A more appropriate standard would be that disclosure of most material should be required whenever the evidence would be useful to the defense in preparing or presenting its case. Comment, Brady v. Maryland and The Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112 (1972). Arguments have also been presented for an open file policy. Note, Implementing Brady v. Maryland: An Argument for a Pretrial Open File Policy, 43 U. Cinn. L. Rev. 889 (1974).



That the conduct of the trial court represents an abuse of discretion is confirmed by two salient factors which set petitioner's case apart from most others on which a Brady appeal is taken. First, the prosecutor never represented to the trial court that the subject notes contained no Brady material. Second, no in camera inspection of the disputed materials was conducted, and the notes were never sealed and made part of the record for appellate purposes. Thus, there was no assurance at the trial level that the disputed notes lacked material favorable to the defense. Such procedures cannot be countenanced by this Court.

Clearly, courts have the discretionary power to conduct in camera examinations when Brady claims are made. See, e.g., United States v. De Sena, 490 F.2d 692 (2d Cir 1972); United States v. Davis, 487 F.2d 112 (5th Cir. 1973); Pollard v. United States, 441 F.2d 566 (7th Cir. 1971). On the other hand, appellate courts have upheld trial courts refusing to conduct such examinations, see, e.g., Frazier v. United States, 394 F.2d 258 (4th Cir. 1968), because of a reluctance to "rummage through the prosecutors' files on behalf of the defendant." Id. at 262.

In petitioner's case, a specific request for known materials was made, no in camera inspection nor sealing of the record occurred, and no assurances were made by the prosecutor that there was no Brady material. It is submitted that this case presents a proper vehicle for this Court to establish uniform procedures for the handling

of Brady allegations at the trial court level and amici respectfully suggests the following:

First, a demand by the defense for the production of Brady evidence. Second, the disclosure by the prosecution of the exculpatory evidence or denial that such evidence exists. Third, if the defendant is not satisfied with the production or denial of existence, the trial court should undertake an in camera examination of specifically identified material designated by the defense. Such material should be made part of the sealed records of the court for appellate review.

This procedure while involving some expenditure of judicial time at the trial level has substantial merit. It avoids the wholesale rummaging through the prosecution file disapproved of in United States v. Frazier, supra. It avoids reliance on unbridled prosecutorial discretion as to what is favorable. It facilitates appellate review by requiring the defense to specify documents and make them part of the record. It provides a second opinion at the trial stage by an impartial arbiter as opposed to an advocate, so that the incidents of reversible error are reduced and the policy of judicial economy is enhanced. Cf. Comment, Brady v. Maryland and The Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112, 120-135 (1972). Similar procedures have received the imprimatur of both Congress and this Court in the area of resolving Jencks Act disputes.

The trial court adopted the worst possible procedure to resolve petitioner's Brady request. It failed to ask for any assurance from the prosecutor, to conduct its own



inspection, or to properly preserve the record for appellate review. Under these circumstances petitioner's conviction should be reversed.

## CONCLUSION

For the foregoing reasons, as well as those contained in petitioner's brief, amici respectfully submit that this Court reverse the decision of the Court of Appeals.

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# APPENDIX

## APPENDIX

18 U.S.C. § 3500

Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relates to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of

the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subjection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means ---

(1) a written statement made by said witness and signed or otherwise adopted or approved by him:

(2) a stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

As amended Pub.L. 91-451, Title 1, §102, Oct. 15, 1970, 84 Stat. 926.